A

MOHAMAD KARIM BUJANG

v.

PP

B

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CRIMINAL APPEAL NO: SRA-42-5-12-2012]
31 JULY 2013

C ***CRIMINAL PROCEDURE:*** *Appeal - Appeal against conviction and sentence - Appellant convicted for trafficking in Indonesian nationals - Indonesians convicted for illegal entry by Sessions Court - Grounds of appeal - Non-compliance of s. 51A Criminal Procedure Code - Whether vitiated trial - Whether warrants of commitment and notes of proceedings*
D *from Sessions Court trial against Indonesians submitted in present proceedings - Failure to honour promise to charge for lesser offence - Whether conviction and sentence safe - Anti-Trafficking in Person and Anti-Smuggling of Migrants Act 2007, s. 26J - Criminal Procedure Code, s. 51A*

E

The appellant was caught while conveying three Indonesian nationals in his car. All the three Indonesians had been charged and convicted for illegal entry into the state by another Sessions Court. The appellant was subsequently charged in the Sessions
F Court for trafficking the three Indonesians under s. 26J of the Anti-Trafficking in Person and Anti-Smuggling of Migrants Act 2007 ('Act'). In his defence, the appellant testified that he was asked by a friend to convey the Indonesians and was paid for the transportation. He confirmed of not being aware of whether the
G Indonesians had passport. After a full trial, the appellant was convicted and sentenced to two years' imprisonment and fined RM10,000 in default five months' imprisonment. The appellant appealed against the conviction and sentence. In his first ground of appeal, the appellant, who was not represented, contended that
H s. 51A of the Criminal Procedure Code ('CPC') was not complied with as he was not served with the relevant documents in respect of the charge. The prosecution, however, submitted that the non-compliance of s. 51A of the CPC was not fatal to the proceedings as the documents were explained and understood by the appellant
I before it was tendered as evidence. Further, the appellant had no objection to its tendering. The second ground raised by the appellant was the non-evaluation of the prosecution's evidence

with regards to the warrants of commitment for the three Indonesians and the notes of proceedings taken of their evidence by the other Sessions Court Judge and to account for the contradiction in the evidence of the arresting officer ('PW1') and investigating officer ('PW6'). The complaints were that the warrants of commitment and the notes of proceedings of the other Sessions Court Judge were not given to the appellant and was not referred to the investigating officer at trial. In his third ground of appeal, the appellant contended that PW6 had not honoured his promise to charge the appellant with a lesser charge under the Commercial Vehicle Licensing Board Act. Hence, it was contended that the failed promise had prejudiced the trial and his conviction should be overturned.

Held (dismissing appeal):

(1) The object of s. 51A of the CPC was to prevent a trial by ambush. The non compliance with s. 51A did not vitiate the trial despite the mandatoriness of the section. When an accused person requested for documents covered by the section, the prosecution must supply it. An unreasonable refusal could be held adversely against the prosecution. Where the accused did not make such request and at the trial, the accused was given the opportunity to examine the documents beforehand and was not prejudiced by not being given the documents in advance, then the trial could not be a nullity on account of non-compliance with the section. (paras 6 & 7)

(2) There was no merit on the ground that the warrants of commitment was not given to the appellant and not referred to the investigating officer at the trial. This was because the warrants were court orders and official record of the proceedings which the court must presume to be genuine and true under s. 80 of the Evidence Act 1950 ('Evidence Act') as well as s. 114 of the Evidence Act. The tendering of the court documents by the Registrar of the subordinate court sufficed to invoke the legal presumptions without a need for more. There was no material contradictions in the evidence of PW1 and PW6 which would affect their credibility that would compromise the case for the prosecution in the absence of particularisation of the alleged contradictions. (para 8)

(3) The promise by PW6 to charge the appellant for a lesser offence and the non-honouring could not amount to anything under the law. It would not vitiate the trial and impinge the

A appellant's conviction as the appellant had pleaded not guilty to the more serious charge and was induced by the promise to plead guilty to a lesser charge. The failed promise did not prejudice the trial and could not be used to overturn the appellant's conviction. (paras 9 & 10)

B **Case(s) referred to:**
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Nujim Matusin v. PP [2012] 1 LNS 539 HC ***(foll)***
PP lwn. Venkatakrishnan Radhakrishnan [2010] 1 LNS 1783 HC ***(refd)***

C **Legislation referred to:**
Anti-Trafficking in Person and Anti-Smuggling of Migrants Act 2007, ss. 2, 26J
Criminal Procedure Code, ss. 51A, 399, 402A
Evidence Act 1950, ss. 80, 114(e)

D *For the appellant - Abang Mohd Tosen; M/s Mohd Tosen Advocs*
For the respondent - Musli Ab Hamid; DPP

[Appeal from Magistrate's Court; Criminal Case No: SRA-62AT-1-3-2012]

Reported by Sandra Gabriel
E

JUDGMENT

Rhodzariah Bujang J:
F

[1] The appellant was charged in the Sessions Court for human trafficking of three Indonesians under s. 26J of the Anti-Trafficking in Person and Anti-Smuggling of Migrants Act 2007 ("the said Act") and after a full trial was convicted and sentenced to two
G years imprisonment and fined RM10,000 in default five months imprisonment.

[2] In summary the evidence adduced by the prosecution shows that the appellant was caught whilst conveying the three
H Indonesians in his car at 9th Mile, Sri Aman-Sibu Road, Sri Aman. All three had been charged and convicted of the offence of illegal entry into the state by another Sessions Court before the trial of the appellant. The car driven by the appellant that day was registered in his name. Evidence of their convictions were
I tendered by the Registrar of the Subordinate Court as was the ownership of the car by the appellant through an officer of the road transport department. The incriminating evidence of the three Indonesians (exh. P9) against the appellant were separately taken,

by way of depositions, by another Sessions Court Judge. The elements of the charge under the said s. 26J have therefore been proved following the definition of "smuggling of migrants" under s. 2 of the said Act which provides as follows:

> (a) arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and
>
> (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a).

[3] The appellant in his defence said that he was asked by a friend to bring the Indonesians to Mukah who told them that they were workers and runaways from a plantation company, Mas Ranti Plantation. He said he did not know whether they have passports. In cross-examination he admitted receiving money from them for the transportation and confirmed that he did not ask if they have passports. To a question by the court, he said that they did not speak with an Indonesian slang and he thought they were from Mukah.

[4] At the hearing of the appeal before me, the appellant's counsel raised two grounds which he submitted should reverse the conviction entered:

(i) Non-compliance with s. 51A of the Criminal Procedure Code.

(ii) Non-evaluation of the evidence of the prosecution's evidence with regards to the warrants of commitment for the three Indonesians and the notes of proceedings taken of their evidence by the other Sessions Court Judge and to account for the contradiction in the evidence of PW1 and PW6. PW1 was the arresting officer who testified that he effected the arrest of the appellant at the said road and detained the three Indonesians who were with the appellant in his car at the material time.

(iii) Non-honouring of the promise by the investigating officer (PW6) to charge the appellant with a lesser charge under the Commercial Vehicle Licensing Board Act.

Non-compliance With Section 51A

[5] The appellant was unrepresented at the trial and it is not anyone's fault. The notes of proceedings at p. 1 of the appeal record states that "he do not wish to engage counsel for today's proceedings". The prosecution candidly admitted, in the submission of the learned Deputy Public Prosecutor, Musli Bin Ab Hamid that he was not served with the relevant documents in respect of the charge but that, said the learned Deputy Public Prosecutor, is not fatal to the proceedings because before each document were tendered as evidence, the same was explained to him and he said that he understood them and have no objection to their tendering. He cited the case of *Nujim Matusin v. PP* [2012] 1 LNS 539 where it was held that failure to comply with this section does not render the evidence inadmissible. The appellant's counsel in turn referred me to *PP lwn. Venkatakrishnan Radhakrishnan* [2010] 1 LNS 1783 which upheld the decision of the learned Sessions Court Judge in rejecting documentary evidence which were not served on the defence as required by the said section.

[6] It is indeed true as is stated in *Venkatakrishnan*'s case (*supra*) that the object of s. 51A is to prevent a trial by ambush. It is also a guarantee for a fair trial as stated by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265, the full text as it appears at p. 288 as follows:

> In our view, this new provision strengthens the guarantee of a fair trial in providing the adequate facilities as purported in the General Remarks document of the Human Rights Committee that was read to us. Section 51A CPC has, in our opinion, made the battlefield move level, to preserve the "equality of arms principle", ensure the fairness of a trial and ultimately uphold the very integrity of the courts in its administration of criminal justice. This should also be considered in the light of our criminal justice system where the burden of proof lies throughout on the prosecution, which, together with the common law principle of presumption of innocence, safeguard that fairness.

[7] However, despite the mandatoriness of that section from the use of the word 'shall' in its opening sentence, I am of the view that non-compliance with it does not vitiate the trial and in this regard I share the view of David Wong Dak Wah J (as His Lordship then was) in *Nujim*'s case which distinguishes between

provisions which regulate the manner of trial such as ss. 399 and 402A of the Criminal Procedure Code and that which provides for its conduct such as s. 51A. The latter is merely procedural, said His Lordship whilst the former, evidential. I would also add that this reasoning does not mean that the said section is enacted in vain. It simply means that when an accused person requests for the documents covered by that section, the prosecution must supply them and an unreasonable refusal to do so would and can be held adversely against them if they chose to be stubborn about it. But where the accused did not make such a request and at the trial he was given the opportunity to examine the documents beforehand (as in this case) and to voice his objection (if any) on them and was not prejudiced by not being given them in advance (as in this case), then the trial could not be a nullity on account of non-compliance with the section.

Non-evaluation Of The Evidence

[8] The complaint here is with regards to the warrants of commitment of the three Indonesians and the notes of proceedings of the learned Sessions Court Judge who examined them for not being given to the appellant and not referred to the investigating officer at the trial. With respect, there is no merit in this ground because the warrants are court orders and the official record of the proceeding which, as rightly submitted by the learned Deputy Public Prosecutor the court must presume it to be genuine and true under s. 80 of the Evidence Act 1950 as well as s. 114 thereof which further presumes under illustration (e) that judicial and official acts have been regularly performed. The tendering of these court documents by the Registrar of the Subordinate Court (PW3) sufficed to invoke the legal presumptions under the aforesaid sections without a need for more. As for counsel's contention that there are contradictions in the evidence of PW1 and PW6, there was no particularisation of the alleged contradictions and on my own reading of their evidence, I failed to see any material contradictions which would affect their credibility and compromised the case for the prosecution.

The Failed Promise

[9] Although the facts of the case adduced by the prosecution show that the appellant had also committed a lesser offence of conveying passengers without any licence from the Commercial Licensing Board, the promise even if it were made by PW6 to

charge him for that lesser offence, when it was not honoured could not amount to anything under the law – it could not vitiate the trial definitely and impinge on his conviction because the fact is he pleaded not guilty to the more serious charge, not that he was induced by it to plead guilty to that lesser charge.

[10] Again, as before, that failed promise, if it were made, did not prejudice the trial at all and could not be use to overturn his conviction which in my view is safe. Thus, I would dismiss his appeal against conviction. As for the sentence, his counsel did not address me on it. Given that the maximum penalty under the law is five years imprisonment and a maximum fine of RM250,000 or both imprisonment and fine, the sentence of two years imprisonment and the RM10,000 fine is not manifestly excessive, considering that no good mitigating factors were raised by the appellant before the learned Sessions Court Judge on the day of sentencing. Accordingly his appeal against sentence is similarly dismissed.